No. 22,395

IN THE

United States Court of Appeals

For the Ninth Circuit

SHAFFER C. TISI,

Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,

Appellee.

Appeal from an Admiralty Decree of the United States District Court for the Northern District of California

Honorable Lloyd H. Burke, District Judge

APPELLEE'S BRIEF

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JURISDICTION

Jurisdiction of this Court exists, under 28 U.S.C. §1291, by virtue of a Notice of Appeal (R. 1, p. 92)[1] filed October 9, 1967, from a Final Decree (R. 1, p. 112) in admiralty entered in the United States District Court for the Northern District of California on October 5, 1967.

The District Court had jurisdiction, under 28 U.S.C. §1333, by virtue of a Libel (R. 1, p. 1) for damages,

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[1]The record in this case consists of four volumes, not consecutively paginated. The references to both the pleadings and the oral evidence, therefore, are by volume number and page number, e.g., "R. 2, p. 75." Exhibits are referred to by letters, e.g., "Ex. A."

under the Jones Act (46 U.S.C. §688) and the General Maritime Law.

STATEMENT OF THE CASE

Appellant Shaffer C. Tim commenced this action by filing a Libel (R. 1, p. 1) against his former employer, American President Lines, Ltd., for damages on account of an injury, claiming that it resulted from negligence of Appellee and unseaworthiness of Appellee's vessel, the SS PRESIDENT TYLER, on which Tim was then serving as a seaman. The injury was found to have been caused by the concurrent negligence of Tim and a longshoreman-employee of a stevedore company employed by the United States and on board under its contract with the Government to handle the Government's cargo. The District Court found that the vessel and her appurtenances were seaworthy, that the stevedore was not an agent of the vessel owner, American President Lines, Ltd., and that American President Lines, Ltd. had not been negligent.

The underlying facts may be stated largely by quoting from the findings of the District Court.[2]

> "2. Libelant Shaffer C. Tim was employed by respondent as a seaman aboard the SS PRESIDENT TYLER in the capacity of chief electrician, from January 26 until February 2, 1965, when he suffered an accident in the course and scope of his employment.

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[2]The complete Findings of Fact and Conclusions of Law are printed in Appendix "A" to this brief.

"3. At about 0900 on February 2, 1965, cargo at the No. 4 hatch of the SS PRESIDENT TYLER was being worked by employees of Matson Terminals, Inc. The loading and unloading of the cargo then aboard the SS PRESIDENT TYLER was done pursuant to a contract between the United States Government and American President Lines (MSTS Contract with American President Lines No. 48 dated July 1, 1950) and pursuant to a contract between the Procurement Division, U.S. Army Terminal Command, PAC, a branch of the United States Government, and Matson Terminals, Inc. (#DA-04-197-AMC-215(m)) effective July 1, 1964, and the terms of these contracts governed responsibilities as to the loading and unloading of the cargo. These contracts were not regarded by the trial judge as having significance insofar as the judgment reached was concerned.

"4. Respondent American President Lines did not select Matson Terminals, Inc. to load or unload the cargo aboard the SS PRESIDENT TYLER on February 2, 1965, had no oral or written contract with Matson Terminals, Inc. to do so and was not shown to have any ownership or other financial interest in Matson Terminals, Inc.

"5. Matson Terminals, Inc. was not the agent of American President Lines within the meaning of the common law agency concept or of 45 U.S.C. §51, as interpreted by the Supreme Court cases of *Sinkler v. Missouri Pacific Railroad Co.,* 356 U.S. 326 (1958) and *Hopson v. Texaco,* 383 U.S. 262 (1966), and was therefore not performing operational activities of the respondent at the time of the accident.

"6. The cargo was being worked by use of a mechanical apparatus known as a gantry crane. The

gantry crane was operated from a cab mounted upon the crane, about 30 feet above the weather deck and over the No. 4 hatch. The 'operating unit' relevant to this action consisted of the operator's cab, the controls to operate the crane inside the cab, a steel mesh platform to starboard and outside of the operator's cab and a safety screen which, when in the 'non-operating' position, lay over the top of the operator's cab and, when in the 'operating position,' extended over the platform outside the operator's cab. In order to enter the operator's cab, it was necessary to descend four steps, each step consisting of one horizontal steel bar, to reach the steel mesh platform. Once on the steel mesh platform, one would turn left and enter through a door to the operator's cab, which was approximately five feet square. Inside the operator's cab were the controls of the gantry crane and a chair which faced forward, from which the gantry crane operator would operate the gantry crane unit.''

* * * * *

''8. The gantry crane operator's cab had a safety screen over the top of it, which, if extended to its starboardmost position, engaged an electrical circuit which energized the gantry crane and allowed it to operate. When the safety screen was moved about two to three inches to port from its 'operating position,' the electrical circuit was de-energized and the gantry crane unit would not operate. Libelant knew how to operate the gantry crane and knew the movement of the safety screen would render the gantry crane inoperative.''

* * * * *

''10. The safety screen was of sufficient size to preclude an individual standing on the steel mesh

platform from raising his head above the screen vertically, that is, in a direct line perpendicular to the steel mesh platform."

* * * * *

"12. At about 0830 on February 2, 1964, a supervisory employee of Matson Terminals, Inc. complained to libelant that the gantry crane was not operating fast enough and requested libelant to remedy that situation. Pursuant to that request, libelant went to the operator's cab of the gantry crane (which was then occupied by Harry Johnson) and made adjustments which allowed the gantry crane to move athwartship at a faster speed.

"13. After libelant made the necessary adjustments to allow the gantry crane to move faster, he stood behind Harry Johnson, inside the cab, and observed the gantry crane operation. Libelant then thought he noticed that an electrical cable leading to the spreader apparatus of the gantry crane had become disengaged from its reel and he told Johnson, the gantry crane operator, that he wanted to inspect the electrical cable and Johnson brought the gantry crane to a stop in response to libelant's request.

"14. After waiting for the crane operator, Harry Johnson, to stop the crane, libelant then proceeded to the steel mesh platform outside the operator's cab. At that time the safety screen was at its starboardmost position, which allowed the gantry crane to operate. In order to inspect the electrical cable reel, libelant, by placing his feet on the second rung of the ladder leading to the platform and craning his head outside and atop the safety screen, was able to and did put his head into the space outside the screen, without placing the safety screen in the non-

operative position and shutting off the power. Libelant assumed the operator of the gantry crane would not operate the crane while libelant was in a position of danger. While libelant had his head outside the safety screen, the gantry crane operator started the gantry crane and libelant's head was caught and injured between the outboard portion of the safety screen and a stationary overhead object which came into contact with libelant's head because of the movement of the gantry crane.[3]

"15. At all material times the gantry crane was operated by Harry Johnson, an employee of Matson Terminals, Inc."

* * * * *

"18. At the time of libelant's accident, the gantry crane, including the safety screen above the steel mesh platform, was in good working order and reasonably fit for its intended use.

"19. It was not negligent for libelant to be on the steel mesh platform when the crane was in the operative position, nor was it negligent for the crane operator to operate the crane when libelant was on the steel mesh platform.

"20. At the time of his accident, libelant knew that he could have moved the safety screen to the 'non-operating position' in a matter of several seconds and knew that he had the right to do so, but did not do so. Libelant further knew that, had he done so, the gantry crane unit would have been inoperative. Libelant was negligent in failing to move the

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[3]Finding 14 did not include a determination that the plaintiff "relied on . . . the operator of the gantry crane" not to operate the crane, as stated in Appellant's Brief, p. 5.

safety screen to the 'non-operating position' before he placed his head outside the safety screen."

* * * * *

The District Court heard the testimony of all witnesses in open court and, after argument, announced its decision that the Appellant had failed to establish unseaworthiness or negligence of American President Lines and that the injury was the result of the joint and equal negligence of the Appellant and the stevedore employee operating the crane, and entered Findings of Fact and Conclusions of Law and Decree accordingly.

This appeal raises principally the question of whether the District Court's findings that Appellee's vessel was seaworthy and that Matson Terminals, Inc. was not an agent of the Appellee, based on substantial, convincing evidence in the District Court, should be overturned. Appellant also raises questions about the finding of contributory negligence and the amount of potentially recoverable damages. These questions would only arise in the event of a reversal of the decision below.

SUMMARY OF ARGUMENT

The findings in this case, as in other civil cases, are subject to the "clearly erroneous" rule and therefore are to be affirmed unless the evidence leads to a definite and firm conviction that error has been committed. The evidence in this case does not support—much less compel—findings for Appellant and fully supports the District Court's findings.

This Court has consistently held that negligence of longshoremen employees of an independent stevedore is not imputed to the shipowner and that a longshoreman's negligent act at the moment of injury will not cause a vessel to be unseaworthy. *Billeci v. United States,* 298 F. 2d 703, 1962 A.M.C. 826 (9th Cir. 1962) and *Titus v. The Santorini,* 258 F. 2d 352, 1959 A.M.C. 1042 (9th Cir. 1958). Moreover, this Court has denied recovery to injured longshoremen in circumstances in which the injured party failed to utilize known safety precautions. *Larsson v. Coastwise* (*Pacific Far East*) *Line,* 181 F. 2d 6, 1950 A.M.C. 769 (9th Cir. 1950)

The evidence clearly indicated that Matson Terminals, Inc. was not the "agent" of American President Lines, at common law or within the interpretation of 45 U.S.C. §51, as enunciated by *Hopson v. Texaco, Inc.,* 383 U.S. 262, 1966 A.M.C. 28 (1966) and *Sinkler v. Missouri Pacific Railroad Co.,* 356 U.S. 326 (1958). Unlike the parties in those cases, American President Lines was under no contractual relationship with Matson Terminals, Inc. and did not, in fact, choose Matson Terminals, Inc. to perform the unloading duties. Matson Terminals, Inc. was performing its operations pursuant to a contract with the United States Government and unloading the Government's cargo as the Government's contractor and subject to the Government's direction. Furthermore, the concept of the Federal Employers' Liability Act that a railroad is a unitary enterprise is not applicable here, as the Supreme Court, in *Reed v. Steamship Yaka,* 373 U.S. 410, 1963 A.M.C. 1373 (1963), has refused to accept the view that a stevedore and a shipowner are engaged in a uni-

tary enterprise. The cases which Appellant cites in support of his "agency" contention have consistently involved a contractual relationship between the "agent" and the railroad defendant.

The Appellant's claim of unseaworthiness involves a contention that this Court should make a radical change in the doctrine of seaworthiness so that it would no longer be possible to make a fact finding that the vessel was seaworthy in the event of injury through a longshoreman's negligence. Such a contention is contrary to long-established and specific doctrine and involves placing an unwarranted and strained construction upon a *per curiam* order of the Supreme Court.

The finding that Appellant was contributorily negligent in failing to use a safety screen, supplied to prevent the type of injury which he incurred, was supported by substantial evidence and the lower court's propriety in assessing damages without a finding of liability is clearly supported by case law. In any event, the issues dealing with contributory negligence and damages need not be reached in this appeal.

ARGUMENT

I. THE FINDINGS ARE TO BE UPHELD UNLESS CLEARLY ERRONEOUS.

This is an appeal attacking the District Court's Findings of Fact. In an admiralty appeal, such as this, the standard of review of Findings of Fact is the same as in other civil cases under Rule 52, F.R.C.P. *McAllister v.*

United States, 348 U.S. 19, 1954 A.M.C. 1999 (1954). Rule 52 provides, in part, as follows:

> "Rule 52. Findings by the Court. (a) Effect . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ."

Determinations with respect to negligence,[4] seaworthiness[5] and agency relationships[6] are findings of fact falling within this rule.

II. THE NEGLIGENCE OF AN EMPLOYEE OF MATSON TERMINALS, INC. IS NOT IMPUTED TO AMERICAN PRESIDENT LINES SO AS TO MAKE AMERICAN PRESIDENT LINES LIABLE FOR NEGLIGENCE.

In this Circuit it has been consistently held that negligence of a longshoreman employed by the contract stevedore is not imputable to the shipowner. In *Billeci v. United States,* 298 F. 2d 703, 1962 A.M.C. 826 (9th Cir. 1962), a longshoreman was injured when struck by a hatch cover which was caused to fall due to the negligent conduct of a fellow longshoreman. The negligent act of the fellow longshoreman was his failure to use a locking safety device which would have kept the winch from falling out of gear and, had either one of two safety devices

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[4]*Pacific Tow Boat Company v. States Marine Corp.,* 276 F. 2d 745, 752, 1960 A.M.C. 696, 705 (9th Cir. 1960).

[5]*Mahnich v. Southern Steamship Co.,* 321 U.S. 96, 98, 1944 A.M.C. 1, 3 (1944); *Luckenbach v. McCahan Sugar Refining Co.,* 248 U.S. 139, 145 (1918).

[6]*Pacific Can Co. v. Hewes,* 95 F. 2d 42, 46 (9th Cir. 1938); *Mitton v. Granite State Fire Insurance Co.,* 196 F. 2d 988, 990 (10th Cir. 1952).

available to the winch operator, been used, the accident would have been prevented.

The libelant sued for unseaworthiness and *negligence.* The District Court, in its opinion following trial, held that the negligent operation of a seaworthy appliance by the stevedore could not create liability on the shipowner and took notice of the contention that the negligence of the stevedore should be imputed to the shipowner, but refused to do so. 185 F. Supp. 711, 715, 1961 A.M.C. 111, 117.

Agreeing that, "plaintiff's injury was sustained by the negligent *use* of a seaworthy appliance at the very moment of injury," and "that the winch and its appurtenances were seaworthy and reasonably fit for their intended use and that libelant's injuries were directly and solely caused by a fellow longshoreman's negligent operation of the winch," this Court affirmed. 298 F. 2d at 706-7, 1962 A.M.C. at 830.

In *Titus v. The Santorini,* 258 F. 2d 352, 1959 A.M.C. 1042 (9th Cir. 1958), Judge Chambers posed a situation similar to that presented in the instant case. In discussing why a rope broke, Judge Chambers considered four possibilities. In connection with the third possibility he stated:

> "Third, there was the possibility the winch was improperly operated or the loading was improperly done by a fellow longshoreman at the instant when the breaking occurred. In this field, the outlawed practice of winch operators 'tightlining' their cables and producing an unusual strain on the wires and lines is the most typical. But there are others. There was no direct evidence that the loading was conducted

> in any way but in a skillful manner. *But if the causation of the break was in the third category, negligence at the moment of a fellow longshoreman, the ship would not be liable.*" (Emphasis added.) 258 F. 2d at 353, 1959 A.M.C. at 1044.

In *Larsson v. Coastwise (Pacific Far East) Line,* 181 F. 2d 6, 1950 A.M.C. 769 (9th Cir. 1950), Larsson, a seaman, was injured while he was oiling a winch which was negligently thrown into operation by a longshoreman. The appellant (Larsson) contended that the ship was unseaworthy and that the shipowner was liable for damages caused by, among other things, the negligence of the winch driver who commenced operation of the winch while appellant was oiling it. As in the present case, the appellant's own negligence in failing to make use of safety devices provided concurred with the negligence of the longshoreman to produce the injury. This Court stated:

> "The crucial fact in the case, however, is that each winch on the ship was equipped with a shut-off valve; that the oiler, by means of the valve, could close and cut off the steam to the winch; and that by cutting off the steam, the winch would be rendered immovable and absolutely safe to everyone. It is the contention of the appellee, therefore, that the injury to appellant resulted from his failure to use the simple safety precaution of cutting off the steam from the winch valve before proceeding to oil the winch." 181 F. 2d at 8, 1950 A.M.C. at 771.

This Court upheld the shipowner's contention and affirmed the decision.

III. THE DISTRICT COURT'S FINDING THAT MATSON TERMINALS, INC. WAS NOT THE "AGENT" OF AMERICAN PRESIDENT LINES WAS FULLY SUPPORTED BY THE EVIDENCE IN ACCORDANCE WITH APPLICABLE LEGAL STANDARDS.

The United States Government and American President Lines agreed by contract that all cargo would be loaded by the government at any dock or wharf that the government may direct. The government was to pay all stevedoring expenses and any damage done by the act or neglect in performing the government's duties of loading and discharging the vessel was to be repaired at the government's expense.[7]

The United States Government and Matson Terminals, Inc. agreed by contract that Matson Terminals, Inc. would perform all stevedoring services at Oakland Army Terminal and the government would provide Matson Terminals, Inc., among other things, the names of the vessels booked for cargo, the bills of lading and a cargo stowage plan. Matson Terminals, Inc. was responsible for the work area upkeep and was liable to the government for bodily injury occasioned in whole or in part by Matson Terminals' negligence.[8]

The definition of the word "agent" as used in the Federal Employers' Liability Act, 45 U.S.C. §51, has been interpreted by the Supreme Court in *Hopson v. Texaco, Inc.*, 383 U.S. 262, 1966 A.M.C. 281 (1966), as follows,

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[7]Contract No. MST-48 Article 5, Sections A, B, F, G; Appellee's exhibit in evidence, which by stipulation will be marked "F".

[8]Contract No. DA-04-197 AMC 215(n), Section 1 (A), (D), (N), Section III GP (32)(A)(3); Appellee's exhibit in evidence which by stipulation will be marked "E".

quoting *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958):

> "In order to give 'an accommodating scope . . . to the word "agents", . . . we concluded that when [an] . . . employee's injury is caused in whole or in part by the fault of others performing, *under contract*, operational activities of the employer, such others are "agents" of the employer within the meaning of Section 1 of F.E.L.A.'" (Emphasis added.) 383 U.S. at 264, 1966 A.M.C. at 283.

Matson Terminals, Inc., was found, upon very clear evidence, not to come within this definition. Based on uncontradicted evidence, which Appellant does not challenge, the trial court found:

> "Respondent, American President Lines did not select Matson Terminals, Inc. to load or unload the cargo aboard the SS PRESIDENT TYLER on February 2, 1965, had no oral or written contract with Matson Terminals, Inc. to do so and was not shown to have any ownership or other financial interest in Matson Terminals, Inc." (Finding of Fact No. 4, Appendix "A")

The Supreme Court emphasized in *Hopson:*

> "And it was respondent—not the seamen—which selected, as it had done many times before, the taxi service. Respondent—the law says—should bear the responsibility for the negligence of the driver which it chose." 383 U.S. at 264, 1966 A.M.C. at 283.

American President Lines did not select Matson Terminals, Inc. to load the cargo which was being loaded aboard the SS PRESIDENT TYLER at the time of

Appellant's accident (Finding of Fact No. 4, Appendix "A"). Matson Terminals, Inc. had contracted with the United States Government to do this work aboard Appellee's vessel and at the time of Appellant's accident Matson Terminals, Inc. was performing services for the United States Government, the owners of the cargo, and not for Appellee or the vessel (Finding of Fact No. 4, Appendix "A").

In *Sinkler, supra,* the petitioner was employed as a cook by the Missouri Pacific Railroad Company. He was injured through the negligence of a member of the switching crew employed by Belt Railway. The court found that Belt Railway was organized by several carriers, including respondent and, in fact, respondent owned one-half of the Belt Railway stock and respondent had designated one-half of Belt's board of directors. Furthermore, the jury, in response to a special interrogatory submitted by the trial judge, expressly found that the "Belt Railway 'submits itself to the right of control and supervision of the other [respondent Missouri Pacific Railroad] with respect to all the details of such work'." 356 U.S. at 328, footnote No. 2.

In deviating from the common law, which regards the torts of fellow servants as separate and distinct from the torts of the employer, the Court, in *Sinkler,* states:

> "[I]t was the conception of this legislation [FELA] that the railroad was a *unitary enterprise,* its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." (Emphasis added.) 356 U.S. at 330.

The holding that a railroad switching company, half owned by the respondent, is the agent of the respondent for the purposes of 45 U.S.C. §51 (the F.E.L.A.), cannot support, much less require, a ruling that Matson Terminals, Inc., an independent contractor not hired or selected by Appellee and engaged in services for interests other than Appellee, i.e., the United States Government and the cargo owners, was the agent of Appellee.

As *Sinkler* emphasized, F.E.L.A. legislation was generated from the conception that the railroad was a unitary enterprise. By contrast with the F.E.L.A. legislative conception, it is distinctly the conception of the Longshoremen's and Harbor Workers' Act that the shipowner and stevedore are not a unitary enterprise. If this were not so—that is, if shipowner and stevedore actually were a unitary enterprise—the shipowner would have the benefit of immunity from suit under the Longshoremen's and Harbor Workers' Act and the third-party lawsuits in which the shipowner is presently sued by the longshoremen would be eliminated.

In the shipping industry, the stevedore and shipowner have separate interests and separate areas of control and they cannot be considered a unitary enterprise. Indeed, the Supreme Court has emphatically refused, in *Reed v. Steamship Yaka,* 373 U.S. 410, 1963 A.M.C. 1373 (1963), to accept the view that stevedore and shipowner are engaged in a unitary enterprise, but, on the contrary, held that, even when a single party performs both functions, it has two separate capacities and, while immune from suit in one capacity, is vulnerable in the other.

It is indeed noteworthy that decisions subsequent to *Sinkler* and *Hopson* in which an "agency" relationship was found, have all involved situations where there was a contractual agreement and arrangement between the employer of the injured party and the "agent." Appellant, unable to cite a case where this is not so, has offered *Carney v. Pittsburgh and Lake Erie Railroad Company,* 316 F. 2d 277 (3d Cir. 1963) and *Leek v. Baltimore and Ohio Railroad Company,* 200 F. Supp. 368 (N.D. W.Va. 1962) for the court's consideration of this question. In *Carney, supra,* the Pittsburgh and Lake Erie Railroad Company was held liable for the negligence of employees of Pittsburgh and Lake Erie Railroad Company Y.M.C.A., where employees of defendant, through agreement with the Y.M.C.A. (agent) were lodged. In the *Leek* case, *supra,* the employer (defendant) was held liable for the negligence of a taxicab company, where for several years the defendant had, by agreement and arrangement, selected the taxicab company to shuttle their train crews from point to point.

As the doctrine of the *Hopson* and *Sinkler* cases, on which Appellant relies, is grounded in the F.E.L.A. and decisions construing that Act, it is appropriate to look at other cases under the F.E.L.A. dealing with comparable situations.

In *Gaulden v. Southern Pacific Company and Pacific Fruit Express Company,* 174 F. 2d 1022 (9th Cir. 1949), this Court affirmed (on the opinion below), the District Court's decision[9] that Pacific Fruit Express Company

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[9]*Gaulden v. Southern Pacific Company and Pacific Fruit Express Company,* 78 F. Supp. 651 (N.D.Cal. 1948).

was not an agent of Southern Pacific Company so as to make Southern Pacific liable, under the F.E.L.A., for negligence of Pacific Fruit in the course of its operation of unloading ice from a railroad car. This was so despite the fact that Pacific Fruit was owned 50% by Southern Pacific and engaged in owning and servicing refrigerated railroad cars and supplying them to Southern Pacific and other railroads under contract provisions which included a recital that services were performed "as the agent of the railroads." Despite the importance of these services and their connection with the railroad's activities in the carriage of fresh fruit, it was held, upon an analysis of the actual relations of the parties and the lack of control by Southern Pacific over the "manner and means" of performance, that no agency relationship existed.

Similarly, in *Del Vecchio v. The Pennsylvania Railroad Company,* 233 F. 2d 2 (3d Cir. 1956), it was contended that, for F.E.L.A. purposes, a company which contracted with the railroad to handle coal for it, unloading it from the railroad cars and loading it into vessels, was an agent of the railroad. As in the present case, there was no common ownership or control of the companies involved and the railroad did not supervise the manner of performance, although it did, in contrast to Appellee's role here, designate the particular cargo to be handled and where it should be delivered. The Court of Appeals emphatically affirmed the finding of the District Court that the contractor was an independent contractor and not an agent. In the present case not even the contractual relationship found in *Del Vecchio* existed between the carrier and the loading stevedore.

As Appellant himself points out (Brief, p. 9), the underlying rationale of *Sinkler v. Missouri Pacific Railroad Company, supra,* was stated as follows:

> "It was the conception of this legislation [F.E.L.A.] that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise *arising out of the fault of any other member engaged in the common endeavor.*" (Emphasis added.) 356 U.S. at 330.

Appellant's contention is that the court below was compelled to find, in effect, that the stevedore's activities constituted part of the "common endeavor," making it a part of a "unitary enterprise" with the shipowner. But the cases already cited, along with other F.E.L.A. cases, show that the concept stated in *Sinkler* is by no means so broad as Appellant contends. The latest of these cases is *Edwards v. Pacific Fruit Express Company,* ..... U.S. ....., 36 L. W. 4291 (1968), where the attempt was to hold Pacific Fruit Express, under the F.E.L.A., as a common carrier by railroad. An unanimous Court, after outlining the functions of the Company (already described in the *Gaulden* case, *supra,* which it cited and followed) referred to previous decisions illustrating "the rationale that there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." 36 L. W. at 4292.

It is against this background that the expression "operational activities" must be read in the *Sinkler* and *Hopson* cases. In *Sinkler* the activity involved was the

movement of railroad cars. This was the very essence of railroading—the activity at the heart of the railroad's operation, without which it could hardly be said to be in the business. In *Hopson,* the activity was the performance of a duty directly imposed upon the shipowner by statute law and therefore, as a matter of law, a part of the shipowner's operations, rather than those of anyone else.

Nothing in the cases suggests or permits the extension of the "operational activities" of a railroad or shipowner to the activities of others, simply because they are connected with its functions or contribute to the transportation of goods by rail or sea. And certainly there is no basis for regarding as "operational activities" of the shipowner the activities of others which the shipowner not only has no legal duty to perform but has not agreed nor held itself out to its customers to perform, nor charged them for, and which are performed by the customer as a means of being able to take advantage of the service it has purchased from the shipowner, which consists, as in the present case, of making its vessels available at agreed rates to carry such cargo as the customer may choose to place on board.

IV. THE COURT'S FINDING OF SEAWORTHINESS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND BY NO MEANS ERRONEOUS.

Appellant makes no claim that error exists in the District Court's findings with respect to the design and construction of the equipment involved in this case and does not claim that the equipment was not in good condition and reasonably fit for the purpose intended, and

points to no evidence to the contrary. In short, Appellant presents no contention at all that the vessel was not seaworthy according to the usual standards by which seaworthiness has been judged.

What Appellant does appear to contend is that a vessel not only may, but must, be found unseaworthy in the event that an accident occurs on board as the result of the negligence of a fellow worker and regardless of the creation of any intervening, dangerous and material condition as a result of such negligence. It requires no citation to remind this Court that it has had many occasions to affirm both findings of seaworthiness and findings of unseaworthiness. The court has repeatedly observed in connection with those cases that the finding of seaworthiness (reasonable fitness of the vessel and her appurtenances for the purpose intended) is a finding of fact which may ordinarily be determined either way by the trier of fact.

What the Appellant now proposes is to reverse the trial court's finding of seaworthiness by the introduction of two novel and revolutionary developments at once. *First,* he would have this Court hold that, without the existence of any unsafe condition antecedent to the injury, unseaworthiness might be found whenever a seaman or longshoreman is injured by the contemporaneous negligence of his fellow worker ("instantaneous unseaworthiness"). *Second,* he would have this Court hold that, when such contemporaneous negligence is discovered, the trier of fact does not have the choice which he has heretofore exercised in the more classic type of unseaworthiness case, but must resolve the issue in only one way, by finding the

vessel unseaworthy. If, as it is generally understood, the policy of the warranty of seaworthiness is to encourage the shipowner to supply and keep in order the proper appliances appurtenant to the ship for the safety of seamen and longshoremen,[10] it is difficult to see how the policy would be served by an extension of the doctrine to cases of contemporaneous negligence of a fellow workman. When the longshoreman assigned to work on the pier is there injured by the negligence of a fellow workman, in the use of equipment or otherwise, the longshoreman has only his workmen's compensation remedy. It is difficult to see why the position should be any different because he happens to be assigned to work aboard ship, if the negligence of the fellow workman has not created some defective vessel condition which itself becomes the cause of the injury.

Appellant bases his far-reaching contentions upon the reading of a *per curiam* opinion of the Supreme Court in *Mascuilli v. United States,* 387 U.S. 237, 1967 A.M.C. 1702 (1967), in which the court, without benefit of hearing, disposed of the matter by citing two prior decisions without comment. It is true that the Court of Appeals for the Second Circuit has read the *Mascuilli* case as Appellant does[11] but the reading is no less strained on that account. As Appellant recognizes (Brief p. 12), the question on *certiorari* was presented in terms of a "dangerous condition." The *Mascuilli* case involved the problem of the

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[10]See *Mahnich v. Southern S. S. Co.,* 321 U.S. 96, 104, 1944 A.M.C. 1, 7 (1944).

[11]See *Candiano v. Moore-McCormack Lines,* 382 F. 2d 961, 1967 A.M.C. 2312 (2d Cir. 1967) cited on p. 13 of Appellant's Brief.

actual parting of a line which was part of the ship's rigging, as well as a problem concerning the proper setting of winch circuit breakers. When one considers that the two cases which the Supreme Court cited without comment in its *per curiam* concerned the parting of a line[12] and a problem of the proper setting of winch circuit breakers,[13] it is indulging in a high degree of speculation to assert that the real meaning of the order was to indicate a Supreme Court determination that a radical change should be made in the doctrine of seaworthiness[14] under which it would no longer be possible to find the vessel seaworthy in a case of negligence of a fellow longshoreman.

In *Fenton v. A/S Glittre,* 1967 A.M.C. 317 (E.D.N.Y. 1966), a winch operator (who was a co-worker of the plaintiff) was taking general cargo on board. When the plaintiff walked towards the cargo draft to steady it, the draft broke apart and, in attempting to remove himself from harm's way, the plaintiff was injured. The District Judge found that the stevedore, Atlantic Stevedoring Company, Inc., was in complete charge of the loading operation and that the shipowner supplied the longshoremen with a reasonably seaworthy ship, together with its gear, for the conduct of stevedoring operations. Concluding that the accident was caused solely by the negligence of the plaintiff *and his co-worker operating the winch,*

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[12]*Mahnich v. Southern S. S. Co.,* 321 U.S. 96, 1944 A.M.C. 1 (1944).

[13]*Crumady v. Joachim Hendrik Fisser,* 358 U.S. 423, 1959 A.M.C. 580 (1959).

[14]See discussion in *Jackson v. S. S. KINGS POINT,* 276 F. Supp. 451 (E.D.La. 1967).

the District Judge gave judgment to the shipowner and against the plaintiff. The Court of Appeals affirmed, *Fenton v. A/S Glittre,* 370 F.2d 146, 1967 A.M.C. 316 (2d Cir. 1966). The United States Supreme Court denied certiorari (387 U.S. 944). Appellee submits that, had the Supreme Court intended to hold in *Mascuilli* that every negligent act of a longshoreman must create an unseaworthy condition, then the *Fenton* case, two weeks later, would have afforded the Supreme Court the obvious opportunity to say so.

V. ALTHOUGH THE DISTRICT COURT'S FINDINGS ON THE DAMAGES ISSUES ARE NOT INVOLVED IN THE DECREE AND NEED NOT BE REACHED BY THIS COURT, THEY ARE APPROPRIATE IN ANY EVENT.

A. Appellant's Contributory Negligence Was Fully Supported by the Evidence and Would Require Reduction of Damages.

The trial judge found that at the time of Appellant's accident the safety screen above the platform upon which Appellant was standing was of sufficient size to preclude an individual standing on the steel mesh platform from raising his head above the screen vertically (Finding of Fact No. 10, Appendix "A"). At trial, Appellant testified that, when he left the operator's cab, he did not tell the crane operator that he was going to put his head outside the safety screen to inspect the electric cable. (R. 3, p. 31).[15]

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[15]"Q. Now, you didn't tell him how you were going to inspect it, did you?

A. No, I just—I told him I am going out.

Q. And you didn't tell him you were going to put your head outside the safety screen and inspect?

A. No."

A finding was also made that it was not negligent for Appellant to be on the steel mesh platform when the crane was operating and it was *not* negligent for the crane operator to operate the crane when Appellant was on the steel mesh platform (Finding of Fact No. 19, Appendix "A"). The gantry crane operator was found to be negligent because he operated the gantry crane when Appellant's head was outside the safety screen after Appellant had stood on the second rung of a ladder leading to the platform and craned his head outside and atop the safety screen (Findings of Fact Nos. 14 and 21; Appendix "A").

After hearing this evidence, the trial judge found that Appellant was negligent in the following manner:

> "At the time of his accident, libelant knew that he could have moved the safety screen to the 'non-operating position' in a matter of several seconds and knew that he had the right to do so, but did not do so. Libelant further knew that, had he done so, the gantry crane unit would have been inoperative. Libelant was negligent in failing to move the safety screen to the 'non-operating position' before he placed his head outside the safety screen." (Finding of Fact No. 20, Appendix "A").

Appellee submits that *Larsson v. Coastwise Line, supra,* following *Shields v. United States,* 175 F. 2d 743, 1949 A.M.C. 1355 (3d Cir. 1949), fully supports, if it does not compel, the finding by this Court that the seaman is to be held for negligence when he fails to use a safety device which would render it impossible for a longshoreman to negligently start the vessel's machinery.

Appellant's brief contends that the District Court erred in holding Appellant negligent because he had the right

to rely on the stevedore performing his duty with care. The cases which Appellant cites all deal with assumption of risk rather than contributory negligence. They conclude that it is not negligent for an employee to assume his employer will exercise due care toward him. The District Court did not conclude Appellant was negligent in assuming his employer would exercise due care, but rather found Appellant negligent because he did not exercise ordinary care in failing to move the safety screen which would de-energize the crane before he placed his head outside and above the safety screen.

Appellant's brief, on page 18, cites the case of *Murphy v. St. Claire Brewing Company,* 41 Cal. App. 2d 535, 107 P. 2d 273 (1940), in which the court affirms an instruction to the jury ". . . it is not negligence to assume that he is not exposed to danger . . . by such other person, *provided that such person himself uses reasonable care to protect his own safety.*" (Emphasis added) 107 P. 2d at 276.

The evidence is uncontradicted that instead of availing himself of a known safety device which had been placed on the gantry crane to prevent this type of accident (Finding of Fact No. 9, Appendix "A"), Appellant took it upon himself to crane his head around and atop the safety screen and that while so positioned he suffered the injuries of which he now complains.

B. The District Court Properly Made a Finding of Fact As to the Amount of Appellant's Damages.

After listening to all of Appellant's evidence on injuries and damages[16] the trial judge concluded that the damages suffered by Appellant amounted to $15,000, so that, after applying the maritime rule of comparative negligence, Appellant's recovery would be $7,500, if Appellee were legally responsible therefor (Finding of Fact No. 26, Appendix "A"). The trial judge also found:

> "The negligence of the gantry crane operator and the negligence of libelant were the sole proximate causes and combined equally to cause libelant's accident and injuries." (Finding of Fact No. 22, Appendix "A").

Appellant does not now assert that he has not had his day in court on the issues of injuries and damages nor that the trial judge did not listen to or fairly assess all the evidence that Appellant had to offer on these issues. Appellant contends, however, that the trial judge could not find on the issue of damages once he found that the Appellee was not liable.

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[16]The Appellant testified that he injured his left ear, right ear, left side of head, neck and shoulder, and that he went to the San Francisco Marine Hospital for 21 days. The trial judge personally inspected Appellant's physical condition and Appellant's hospital records were introduced into evidence. The trial judge heard that Appellant was not fit for sea duty from February 2 until May 17, 1965 and that Appellant claimed he could not work until August 1965, when he joined the JAPAN BEAR. Evidence that Appellant could earn $1,000 a month as chief electrician was presented by Appellant and Appellant's earnings records were introduced into evidence. Proof was made that Appellant was paid maintenance for his unfitness period from February 2 to May 17, 1965 and unearned wages of $1,120 from February 2 until March 25, 1965. The trial judge also learned that, at the time of trial, Appellant "felt all right" (R. 3, pp. 19-26).

It is true that perhaps the trial judge did not have to find on the issue of damages and a failure to do so would certainly not have been reversible error. It does not follow, however, that the District Court cannot make such findings on damages after all the evidence is presented on that issue. Judicial economy in deciding cases is served by having the trial court decide all possible fact issues and the procedure of assessing damages after a finding of no liability (in the event of reversal on the liability question) has been followed by many trial judges and evidently approved by this Court.[17]

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[17]In *Woodbury v. United States*, 232 F. Supp. 49, 59 (D.Ore. 1964), the trial judge, after finding no liability, stated:

> "Under ordinary circumstances, it would be beyond the scope of this opinion, and pure dictum, to pass on the question of damages. However, my findings and conclusions may not meet with the approval of the Court of Appeals. If the appellate court arrives at a different result, it might desire my views on the issue of damages."

The trial court then went on to find the amount that the government would be entitled to recover against the plaintiff if liability existed. The Court of Appeals reversed the trial judge's decision in part, but affirmed findings as to the amount of recovery. *United States v. Woodbury*, 359 F. 2d 370, 379 (9th Cir. 1966).

In *Neterer v. United States*, 183 F. Supp. 893, 1960 A.M.C. 1788 (D.Md. 1960), Judge Watkins found no liability on the part of the shipowner, but stated that, if required to determine damages, the court would fix damages at $7,500 and would find that libelant contributed to his own injuries to the extent of 75%.

In *Young v. United States*, 272 F. Supp. 738 (D.S.C. 1967), the trial judge, after finding that the court did not have jurisdiction, stated:

> "Nevertheless, in order to fully resolve the case after hearing the evidence, and in order to save a possible remand, I have also conditionally ruled on the merits even though I have determined the court has no jurisdiction." 272 F. Supp., at 743.

In *Gomez v. SS DOROTHY*, 183 F. Supp. 499, 1960 A.M.C. 82 (D.P.R. 1959), Judge Delehant stated:

> "The court has thus proceeded with its findings of fact to a determination respecting the damages by the libelant sus-

For cogent reasons of judicial economy, there is ample precedent for the propriety of the course taken by the judge below on the issue of damages. Indeed, like other findings of fact, those dealing with the subject of damages should stand unless clearly erroneous. *Waterman Steamship Corp. v. Rodriguez,* 290 F. 2d 175 (1st Cir. 1961).

CONCLUSION

For the foregoing reasons we submit that the Decree should be affirmed.

April 29, 1968.

Respectfully submitted,

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tained for which an award should be made, if it were assumed or found that he is entitled at all to recover against the respondents. That course has been thought to be appropriate in recognition of the possibility that it may ultimately be determined on appeal that the court is mistaken in the findings of fact now to be announced, and directly oriented to the legal responsibility to the libelant on the part of the respondents. The aggregate amount of the several items of damages thus found is $4,488.88." 183 F. Supp., at 507.

Judge Kilkenny, in *Tallmon v. Toko Kaium K. K. Kobe,* 278 F. Supp. 452 (D.Ore. 1967), held that the maximum recovery under the Oregon death statute, when applied to admiralty law, is $25,000, and announced that, since the Court of Appeals might take a different view, he believed the trier of facts in this case might well go forward and determine the amount of actual damages as if no such limitation existed.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Garrett P. Graham,
Of Attorneys for Appellee.

(Appendix "A" Follows)

Appendix "A"

Appendix "A"

FINDINGS OF FACT

1. Respondent American President Lines, Ltd. owned and operated the SS PRESIDENT TYLER.

2. Libelant Shaffer C. Tim was employed by respondent as a seaman aboard the SS PRESIDENT TYLER in the capacity of chief electrician, from January 26 until February 2, 1965, when he suffered an accident in the course and scope of his employment.

3. At about 0900 on February 2, 1965, cargo at the No. 4 hatch of the SS PRESIDENT TYLER was being worked by employees of Matson Terminals, Inc. The loading and unloading of the cargo then aboard the SS PRESIDENT TYLER was done pursuant to a contract between the United States Government and American President Lines (MSTS Contract with American President Lines No. 48 dated July 1, 1950) and pursuant to a contract between the Procurement Division, U. S. Army Terminal Command, PAC, a branch of the United States Government, and Matson Terminals, Inc. (#DA-04-197-AMC-215(m)) effective July 1, 1964, and the terms of these contracts governed responsibilities as to the loading and unloading of the cargo. These contracts were not regarded by the trial judge as having significance insofar as the judgment reached was concerned.

4. Respondent American President Lines did not select Matson Terminals, Inc. to load or unload the cargo aboard the SS PRESIDENT TYLER on February 2, 1965, had

no oral or written contract with Matson Terminals, Inc. to do so and was not shown to have any ownership or other financial interest in Matson Terminals, Inc.

5. Matson Terminals, Inc. was not the agent of American President Lines within the meaning of the common law agency concept or of 45 U.S.C. §51, as interpreted by the Supreme Court cases of *Sinkler v. Missouri Pacific Railroad Co.,* 356 U. S. 326 (1958) and *Hopson v. Texaco,* 383 U. S. 262 (1966), and was therefore not performing operational activities of the respondent at the time of the accident.

6. The cargo was being worked by use of a mechanical apparatus known as a gantry crane. The gantry crane was operated from a cab mounted upon the crane, about 30 feet above the weather deck and over the No. 4 hatch. The "operating unit" relevant to this action consisted of the operator's cab, the controls to operate the crane inside the cab, a steel mesh platform to starboard and outside of the operator's cab and a safety screen which, when in the "non-operating" position, lay over the top of the operator's cab and, when in the "operating position," extended over the platform outside the operator's cab. In order to enter the operator's cab, it was necessary to descend four steps, each step consisting of one horizontal steel bar, to reach the steel mesh platform. Once on the steel mesh platform, one would turn left and enter through a door to the operator's cab, which was approximately five feet square. Inside the operator's cab were the controls of the gantry crane and a chair which faced forward, from which the gantry crane operator would operate the gantry crane unit.

7. Libelant had worked on board the SS PRESIDENT TYLER less than seven days and had never worked on a vessel that had a gantry crane prior to signing aboard the SS PRESIDENT TYLER.

8. The gantry crane operator's cab had a safety screen over the top of it, which, if extended to its starboardmost position, engaged an electrical circuit which energized the gantry crane and allowed it to operate. When the safety screen was moved about two to three inches to port from its "operating position," the electrical circuit was de-energized and the gantry crane unit would not operate. Libelant knew how to operate the gantry crane and knew the movement of the safety screen would render the gantry crane inoperative.

9. An injury involving a similar gantry crane had occurred to a seaman aboard a vessel owned and operated by respondent American President Lines prior to the injury occurring to libelant on board the SS PRESIDENT TYLER. This injury occurred before any safety screen was provided. As a result of the previous accident, American President Lines had provided the safety screen to safeguard seamen.

10. The safety screen was of sufficient size to preclude an individual standing on the steel mesh platform from raising his head above the screen vertically, that is, in a direct line perpendicular to the steel mesh platform.

11. A sign was located inside the operator's cab, reading: "Warning. Before moving trolley or boom, clear all men off top of gantry." The "top of the gantry" was not interpreted to include the steel mesh platform.

12. At about 0830 on February 2, 1965, a supervisory employee of Matson Terminals, Inc. complained to libelant that the gantry crane was not operating fast enough and requested libelant to remedy that situation. Pursuant to that request, libelant went to the operator's cab of the gantry crane (which was then occupied by Harry Johnson) and made adjustments which allowed the gantry crane to move athwartship at a faster speed.

13. After libelant made the necessary adjustments to allow the gantry crane to move faster, he stood behind Harry Johnson, inside the cab, and observed the gantry crane operation. Libelant then thought he noticed that an electrical cable leading to the spreader apparatus of the gantry crane had become disengaged from its reel and he told Johnson, the gantry crane operator, that he wanted to inspect the electrical cable and Johnson brought the gantry crane to a stop in response to libelant's request.

14. After waiting for the crane operator, Harry Johnson, to stop the crane, libelant then proceeded to the steel mesh platform outside the operator's cab. At that time the safety screen was at its starboardmost position, which allowed the gantry crane to operate. In order to inspect the electrical cable reel, libelant, by placing his feet on the second rung of the ladder leading to the platform and craning his head outside and atop the safety screen, was able to and did put his head into the space outside the screen, without placing the safety screen in the non-operative position and shutting off the power. Libelant assumed the operator of the gantry crane would not operate the crane while libelant was in a position of

danger. While libelant had his head outside the safety screen, the gantry crane operator started the gantry crane and libelant's head was caught and injured between the outboard portion of the safety screen and a stationary overhead object which came into contact with libelant's head because of the movement of the gantry crane.

15. At all material times the gantry crane was operated by Harry Johnson, an employee of Matson Terminals, Inc.

16. The distance between the safety screen and the steel mesh platform, while the safety screen was extended over the mesh platform, was less than five feet six inches. Libelant was five feet six inches tall.

17. The safety screen was not large enough to prevent partial physical egress from the steel mesh platform and it was physically possible for the safety screen to have been larger.

18. At the time of libelant's accident, the gantry crane, including the safety screen above the steel mesh platform, was in good working order and reasonably fit for its intended use.

19. It was not negligent for libelant to be on the steel mesh platform when the crane was in the operative position, nor was it negligent for the crane operator to operate the crane when libelant was on the steel mesh platform.

20. At the time of his accident, libelant knew that he could have moved the safety screen to the "non-operating position" in a matter of several seconds and knew that he had the right to do so, but did not do so. Libelant fur-

ther knew that, had he done so, the gantry crane unit would have been inoperative. Libelant was negligent in failing to move the safety screen to the "non-operating position" before he placed his head outside the safety screen.

21. It was negligent of the gantry crane operator to operate the gantry crane when libelant was on the platform outside the operator's cab under the circumstances described.

22. The negligence of the gantry crane operator and the negligence of libelant were the sole proximate causes and combined equally to cause libelant's accident and injuries.

23. Respondent provided libelant with a reasonably safe place to work and was not negligent.

24. The vessel and her appurtenances were reasonably fit for their intended use and seaworthy.

25. Libelant has failed to bear the burden of proof that his injuries were caused by any negligence of respondent or unseaworthiness of its vessel or that Matson Terminals, Inc. or its employees were agents of respondent.

26. The damages suffered by libelant, after applying the rule of maritime comparative negligence, would be $7,500, if respondent were legally responsible therefor.

CONCLUSIONS OF LAW

1. This Court has jurisdiction in admiralty under 28 U.S.C. 1333.

2. Respondent does not have the burden of an insurer and is not required to provide an accident-proof vessel and the mere occurrence of an accident does not impose liability upon the vessel owner. The warranty of seaworthiness requires only the furnishing of a vessel and appurtenances reasonably fit for the intended use.

3. There is no cause of action as such for failure to furnish a safe place to work and damages for such failure must be based upon negligence.

4. Libelant has the burden of proving by a preponderance of the evidence that his accident was proximately caused by the negligence of respondent or the unseaworthiness of its vessel.

5. Respondent shipowner was not engaged in a unitary enterprise with an independent stevedore contractor which it did not own or control and whose work in handling cargo it did not control and supervise. Respondent shipowner is not liable, under the doctrine of *Sinkler v. Missouri Pacific Railroad Co.,* 256 U. S. 326 (1958) and *Hopson v. Texaco,* 383 U. S. 262 (1966) for an injury caused by an employee of such an independent stevedore contractor.

6. Respondent was not negligent or otherwise at fault in the premises.

7. Respondent is entitled to a decree dismissing the libel, with costs.